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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

E. P. JACOBS, and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF SUPPORTING PETITION.

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KELLY & KELLY,
Of Counsel.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of E. P. Jacobs and Augustus Gunter, executor, etc., respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved herein is the liability of the United States for the equivalent of interest from the date of the taking upon the value of private property taken for pub-

lic use. In these cases the Government took possession of the land, pursuant to an act of Congress for improvement of navigation, without instituting proceedings to ascertain the compensation to be paid therefor. The Secretary of War, through the Board of Engineers of the United States, negotiated with and made offers to pay petitioners, which offers were deemed inadequate, and these two proceedings were brought by the respective petitioners, under the provisions of the Tucker Act, in the District Court of their residence, to determine the amount of just compensation as of the date of the taking. Six years elapsed before judgment was finally entered by the District Court fixing the value as of the date of the taking and adding 6 per cent per annum from the date of the taking to compensate for the delay in payment (R. 33-36).

On appeal by the United States to the Circuit Court of Appeals for the Fifth Circuit, this judgment was affirmed as to the value allowed at the time of the taking, but interest or other equivalent for delay in payment was denied (R. 166).

Petitioners insist that this was error.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First. In the absence of agreement, it was the duty of the Secretary of War to institute and diligently prosecute proceedings in condemnation to ascertain the amount of compensation to be paid for petitioners' lands needed for this work of river improvement (U. S. C. A., Title 33, Sections 591-594).

If such proceedings had been taken, it is settled law that interest or other equivalent for delay in payment would have been allowed.

U. S. v. Rogers, 255 U. S. 163;
Seaboard Air Line Rwy. v. U. S., 261 U. S. 299.

This was recognized in the opinion of the Circuit Court of Appeals, but it was held that this rule did not apply to the instant cases because these were not condemnation suits.

Petitioners insist that such holding is in conflict with the holding of this Court in **Seaboard Air Line Rwy. v. U. S.**, supra. When an officer of the Government takes possession of private property for public use, pursuant to an act of Congress authorizing him to do so, the property is thereby condemned. The proceeding to ascertain the just compensation to be paid for such property is a part of the condemnation necessary to vest title, whether instituted by the United States or instituted by the property owner. No distinction can be made in the amount of compensation to be paid because the property owner is plaintiff instead of defendant.

Second. The Circuit Court of Appeals held that the implied contract on the part of the Government to pay petitioners just compensation for their property taken for public use as of the date of the taking was not "a contract expressly stipulating for the payment of interest," and, consequently, interest could not be allowed under **28 U. S. C. A., Sec. 284.**

Petitioners insist that the implied contract on the part of the Government was to pay "just compensation," and that interest or some other equivalent for delay in pay-

ment is a part of such compensation. It is not limited to the market value of the property at the time of the taking.

Third. The Circuit Court of Appeals disallowed interest from the date of the taking, on the ground that interest was prohibited by **Statute Sec. 284, Title 28, U. S. C. A.** Petitioners insist that the just compensation required to be paid by the Fifth Amendment can neither be enlarged nor restricted by statute, and that the Circuit Court of Appeals erred in holding that this statute prohibited the allowance of interest.

Fourth. The Circuit Court of Appeals held that these cases were ruled by the holding of this Court in **U. S. v. No. Amer. Trad. & Transp. Co., 253 U. S. 330.** Petitioners insist that the holding in that case has no application to the instant cases.

Fifth. In the case of **Hurley v. Kincaid, 285 U. S. 95,** this Court denied the right of injunction by a property owner to restrain the Secretary of War from taking possession of private property without first instituting proceedings in condemnation. The ground of this Court's holding was:

> "Complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the act and the authority of the defendants are conceded. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceeding, which it is contended the statute required" **(285 U. S. 98).**

The Circuit Court of Appeals distinguished the instant cases, with the statement,

"In Hurley v. Kincaid, 285 U. S. 95, the question of interest was not considered."

Petitioners insist that the right to interest or other equivalent from the date of the taking to the time of judgment was necessarily considered by this Court in said case, and the decision sustains their position herein.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6567, United States of America, Appellant, v. E. P. Jacobs and Augustus Gunter, Executor, et al., Appellees, and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

E. P. JACOBS, and AUGUSTUS GUNTER, EXEC.,
Petitioners,

By CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

E. P. JACOBS, and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Defendant.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

STATEMENT.

The question in these cases is whether the United States is liable for the equivalent of interest as part of the just compensation required to be paid to petitioners for their land taken by the United States in the improvement of navigation on the Tennessee River in the State of Alabama. The undisputed facts necessary to be considered are these:

In 1916 Congress directed improvement of the Tennessee River for navigation purposes adjacent to the lands of petitioners in the State of Alabama, on condition that

> "local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War" (Sec. 1, 39 U. S. Statutes 399).

Such arrangement was not made and in March, 1919, Congress again directed that this work of river improvement should proceed and provided:

> "The condition precedent, requiring local interests to assume and pay claims for flowage damage, be waived" (Sec. 1, 40 U. S. Statutes 1282).

Thereafter the work was done by building a dam across the Tennessee River at Widow's Bar, some eight (8) miles below the lands of these petitioners, which impeded the natural flow of the river and caused flowage damage to petitioners' lands. This work was completed and the lands overflowed on October 1, 1925 (R. 38).

Later the Government caused surveys to be made and ascertained that flowage easements in 115.2 acres of the lands of petitioner Jacobs and 34.59 acres of the lands of petitioner Gunter's intestate were actually taken by reason of the construction of this Widow's Bar Dam (R. 41). After negotiations and offers of settlement from the Government, each of petitioners brought these proceedings under the Tucker Act, in the United States District Court of their residence (R. 1-12).

At the trial the District Judge dismissed the proceedings because the flooding was intermittent and petitioners had not been wholly evicted thereby. By agreement, the Gunter case was held in court to await an appeal in the Jacobs case (R. 30). Upon appeal the Circuit Court of Appeals for the Fifth Circuit reversed the judgment in the Jacobs case and held that the land of petitioner had been taken, that he was entitled to just compensation therefor and re-

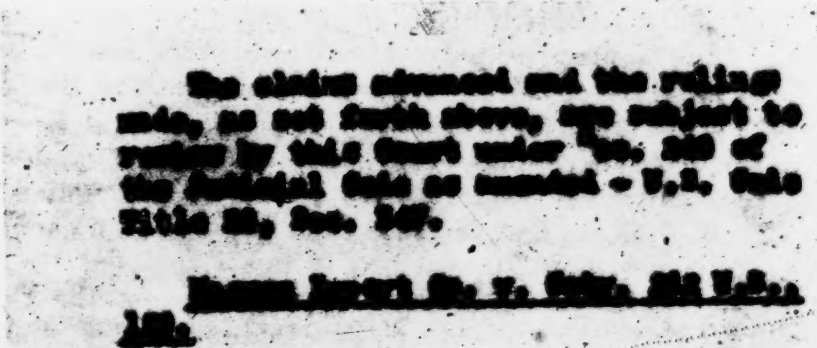
manded the case to ascertain the amount of just compensation (R. 26).

Jacobs v. U. S., 45th Fed. (2) 34.

On the second trial the cases were consolidated (R. 32) and judgment was entered by the District Judge for the value of the land taken, together with interest at the rate of 6 per cent from the date of the taking, in favor of each of petitioners (R. 141-143). This was appealed by the Government (R. 148-151) and the Circuit Court of Appeals affirmed the judgment as to the value of the land taken, but denied interest from the date of the taking (R. 166). In disposing of this question the Circuit Court of Appeals said:

> "In condemnation proceedings instituted by the Government interest is allowed from the date of the actual taking as a part of just compensation under the Fifth Amendment **(United States v. Rogers, 255 U. S. 163)**. As a general rule, however, except where otherwise provided by agreement or by the express words of a statute, interest is not recoverable in suits brought against the United States upon unpaid accounts or claims **(Boston Sand Co. v. United States, 276 U. S. 41)**. And it is provided by statute that 'no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest,' etc. **(Revised Statutes, Sec. 1091; 28 U. S. C. A., Sec. 284)**. This statute applies equally to District Courts exercising jurisdiction under the Tucker Act 'concurrent with the Court of Claims' **(28 U. S. C. A., Sec. 41 [20])**. As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest. Interest

may not be collected 'when the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title,' because the property owner's only right to bring suit against it in the Court of Claims or in a District Court is not founded upon the Fifth Amendment, but upon the existence of an implied promise or contract to pay the value of the property taken **(United States v. North American Co., 253 U. S. 330)**. The just cited case is controlling on the question now under consideration. The suit there, as here, was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. **United States v. Rogers**, supra, and **Seaboard Air Line Rwy. v. United States, 261 U. S. 299**, were condemnation cases. In each the North American case was referred to and distinguished on the ground that it was not a condemnation case. In **United States v. Cress, 243 U. S. 316**, in the course of the opinion the statement was made that the judgments entered in the court below included interest, and those judgments were affirmed. But it was not stated that the interest ran from the date the property was taken, and for all that appears interest was calculated only from the date of the judgment. In **Hurley v. Kincaid, 285 U. S. 95**, the question of interest was not considered" (R. 166).



ERRORS ASSIGNED AND

ARGUMENT.

We respectfully insist that the Court of Appeals erred in its opinion and holding quoted above, for the reasons stated in the petition for certiorari.

First. The federal statutes make it the duty of the Secretary of War to institute proceedings for the condemnation

> "of any lands, easements or rights of way needed for a work of rivers and harbors improvements" (U. S. C. A., Title 33, Sec. 591),

and that the Secretary of War

> "shall have the right to take immediate possession of said lands, easements or rights of way, to the extent of the interest to be acquired" (U. S. C. A., Title 33, Sec. 594).

Under this authority the Secretary of War took "immediate possession" of petitioners' lands by the construction and closing of the dam on October 1, 1925. He then proceeded to ascertain the amount of the damage by surveys and made offer to pay the amount so ascertained (R. 42). Petitioners were not satisfied to accept the offers made and brought these proceedings wherein it was adjudged that they were entitled to several times the amount offered (R. 141-142).

While the statute gives the right of "immediate possession" because the public necessity cannot wait on the procedure to ascertain the amount of the compensation, title does not vest in the United States until the amount of compensation is ascertained and payment made.

Mason City & Ft. Dodge Rwy. Co. v. Boynton, 204 U. S. 570;

Cherokee Nation v. Southern Kansas Rwy. Co., 135 U. S. 641;
Kennedy v. Indianapolis, 103 U. S. 599;
Brownsville v. Cavazos, 100 U. S. 138;
United States v. Lynah, 188 U. S. 445.

The Constitution makes it the duty of the Government before taking title to petitioners' land to ascertain and pay just compensation **(Garrison v. Mayor etc. of New York, 88 U. S. 196)**, and the statute had charged the Secretary of War with the discharge of this duty **(U. S. Code, Title 33, Sec. 591)**. The required proceeding to ascertain the amount of compensation to be paid is not an adverse lawsuit in the ordinary sense, but a mere "inquisition to establish a particular fact" **(United States v. Jones, 109 U. S. 513)**. It is a necessary proceeding to complete the condemnation and vest title in the Government.

The flooding of petitioners' property by this dam across the Tennessee River, completed October 1, 1925, was a taking, probably from the time the dam was started, certainly from the time it was completed **(U. S. v. Lynah,** supra; **Hurley v. Kincaid, 285 U. S. 95)**. This taking was pursuant to statute and lawful. The statutes also provided procedure for ascertaining the value. One statute authorized the Secretary of War to institute the proceeding. Another statute authorized these petitioners to institute the proceedings in case the Secretary of War failed to do so (**U. S. v. Lynah,** supra; **Hurley v. Kincaid,** supra). The proceedings by these petitioners seek nothing except ascertainment of the just compensation due them. If these proceedings had been instituted in the name of the United States by the Secretary of War the Court could do no more than adjudicate the amount of compensation due. The power of the Court and the question involved is ex-

actly the same in both proceedings. One or the other is necessary to complete the condemnation.

Petitioners insist their position is sustained by the holding of this Court in **Seaboard Air Line Rwy. v. U. S., 261 U. S. 299.** The facts of that case are that the Government had seized lands belonging to the railroad to provide storage facilities for war material under authority of the Lever Act. As provided in that statute, the Government had made an estimate of the value of the land taken and tendered that amount in payment. The landowner was not satisfied and brought suit in the District Court.

In deciding that case, this Court said:

> "Section 10 of the Lever Act authorizes the taking of property for public use on payment of just compensation. There is no provision in respect to interest. Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial question (Monongahela Nav. Co. v. U. S., 148 U. S. 312). The compensation to which the owner is entitled is the value and perfect equivalent of the property taken (Monongahela Nav. Co. v. U. S., supra). It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken (U. S. v. Rogers, 257 Fed. 397). He is entitled to the damages inflicted by the taking (No. Pac. R. R. Co. v. No. Amer. Tel. Co., 230 Fed. 347).
>
> "The United States, in effect, claims that the owner is entitled to no more than the value of the land as of the date of taking, to be paid at a later time when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was $235.80 and this was allowed with interest from

the date of taking. But, as judicially determined later, the value when taken was $6,000.00.

"The owner's right does not depend on contract, expressed or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure instituted by the United States for the condemnation of land. The owner was not satisfied by the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation.

• • • • • • •

"The only question here is whether the payment at a subseqent date of the value of land as of the date of taking possession is sufficient to constitute just compensation. In support of its contention, the Government cites U. S. v. No. Amer. Trans. & Trad. Co., 253 U. S. 330. That case does not sustain its contention. That was a suit in the Court of Claims, based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it, adopted by the conformity provisions.

"The case of U. S. v. Rogers, 255 U. S. 163, is a condemnation case and it was held that the owner was entitled, as a part of the just compensation, to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution.

• • • • • • •

"It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and Sec. 10 of the Lever Act directs payment. The rule above referred to, that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at the proper rate is a good measure by which to ascertain the amount so to be added" **(261 U. S. 299-306).**

While the Lever Act, under which the above case was decided, expressly authorized suit in the District Court, without limit in amount for compensation for property taken in event the property owner was not satisfied with the amount fixed by the President, we insist that does not distinguish from the instant cases. The suit so authorized had to follow the procedure of the Tucker Act **(National Casket Co. v. U. S., 263 Fed. 246).**

Sec. 591, Title 33, U. S. Code, under which the property of petitioners was taken, does not expressly authorize them to sue, but the Tucker Act did authorize these suits. The fact that the authority to sue was given in a separate statute should not distinguish the cases. There is no other difference.

Second. It may well be doubted whether the fiction of implied contract is necessary to confer upon the District Court jurisdiction of proceedings of this kind, since the provisions of the Tucker Act carried into the U. S. Code at Sec. 41 (20), Title 28, embrace "claims not exceeding $10,000.00 founded upon the Constitution of the United States, * * * or for damages, liquidated or unliquidated in cases not sounding in tort." It is also doubtful whether these suits are founded upon implied contracts.

Garrison v. Mayor etc. of New York, 88 U. S. 196;
Seaboard Air Line Rwy. v. U. S., supra.

However, accepting the theory of implied contract, the question arises: What is the contract? The Circuit Court of Appeals in the instant case has construed the contract to be that the United States would pay the value of the land taken at some future time when that value was ascertained.

We respectfully insist that such was not the contract which the law implies, because where the owner has been deprived of valuable use of his property, payment at some future time is not "just compensation," within the constitutional requirement.

Bowman v. Ross, 167 U. S. 548;
U. S. v. No. Amer. Transp. & Trad. Co., 253 U. S. 335;
U. S. v. Rogers, supra;
Seaboard Air Line Rwy. v. U. S., supra.

Since the payment of just compensation is a condition precedent to vesting title, the implied contract must be to pay "just compensation" as required by the Constitution and defined by this Court.

We have seen that such just compensation includes more than the value at the time of the taking, paid at a subsequent time. It includes interest or some other equivalent for the delay in payment. Hence, we insist that the contracts included some equivalent for the delay in payment and that interest as allowed by the District Judge is "a good measure" of that equivalent.

Seaboard Air Line Rwy. v. U. S., supra;
U. S. v. Rogers, supra.

Third. Section 284, Title 28, U. S. Code, providing that no interest be allowed by the Court of Claims unless the contract sued on expressly stipulates for interest, prohibits the adding of interest to the amount of the "claim" sued on.

In the instant cases, the per cent added by the District Judge for delay was part of the "claim" itself, and not interest added within the meaning of the cited section of the U. S. Code. It may be called interest only in the sense that it is part of what the contracts "stipulate" shall be paid. In that sense, it comes within the meaning of this statute as interest "expressly" stipulated. This view is supported by these considerations:

A contract is to be construed according to the intention of the parties, and what is implied is as effectual as what is expressed.

Equitable Ins. Co. v. Hearne, 20 Wall. 494;
U. S. v. Babbitt, 95 U. S. 334.

A statute is to be construed to effectuate the legislative intention, and a case within the intention must be considered within the letter of the statute.

U. S. v. Wittberger, 5 Wheat. 76;

Ingleheart v. Ingleheart, 204 U. S. 478;
Rodgers v. U. S., 185 U. S. 83.

Here we have implied contracts which included interest or other equivalent for the delay in payment. We are considering the application to these contracts of a statute, the purpose of which was to prohibit the allowance of interest unless interest was intended by the parties. The words "unless upon a contract expressly stipulating for the payment of interest," as used in this statute, must be construed to mean that it shall appear to the Court that the parties intended the payment of interest. Otherwise, the letter of the statute will defeat the purpose of the parties and impair the obligations of the contract.

Templers etc. Co. v. Jarman, 187 U. S. 197.

Another applicable rule is to adopt that construction which will save the constitutionality of the statute.

Grenada Co. Supervisors v. Brown, 112 U. S. 261;
The Japanese Immigrant Case, 189 U. S. 86;
Miller v. U. S., 11 Wall. 268.

If this statute is construed to limit the power of the Court to award just compensation, then it is invalid because "just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."

Seaboard Air Line Rwy. v. U. S., supra;
Monongahela Nav. Co. v. U. S., 148 U. S. 312.

Hence, we insist this statute must be construed not to prohibit the allowance of interest in these cases.

Fourth. The Circuit Court of Appeals applied to the instant cases the holding of this Court in **U. S. v. No. American Transp. & Trad. Co., 253 U. S. 330.**

We insist that case is distinguished from the instant cases on these grounds:

(a) The District Judge found as a fact in these cases that the addition of 6 per cent per annum was necessary to give petitioners the just compensation to which they were entitled.

In the North American case there was no such finding. On the contrary, this Court in its opinion says:

> "The facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest" **(253 U. S. 338).**

(b) The instant cases are necessary parts of condemnation proceedings to ascertain the value of property taken for public use by an officer of the United States pursuant to statutes authorizing the taking.

The North American case was not a condemnation proceeding. It was brought to recover the value of property which had been seized by a general of the United States Army without authority. The suit had been pending two years before the United States took legal possession of the property. The second count of the petition was for rent alleged to have accrued during the time the property was unlawfully held. For this the United States was not liable, nor was it liable for the property itself when the suit was brought. It became liable before judgment, and the amount of that liability was allowed. The Court referred to the fact that there was a long delay in the litigation as a matter for which the owner may have been largely responsible.

The claim of the owner was that interest accrued as a

matter of law. This claim was rejected and interest denied in accordance with the rule that interest is not to be added unless necessary to give to the owner just compensation.

Shoemaker v. U. S., 147 U. S. 282.

(c) The property for which compensation is sought in the instant cases is situated in the State of Alabama. The laws of that state "relating to suit for condemnation of property" provide that interest shall be added from the time of the taking.

Jones v. N. O. & S. R. R. Co., 70 Ala. 227;
U. S. v. First Natl. Bank, 250 Fed. 299.

The federal statute under which this property was taken provides that proceedings to ascertain the value

> "shall be prosecuted in accordance with the laws relating to suits for the condemnation of property of the state wherein the proceeding may be instituted" **(U. S. Code, Title 22, Sec. 591).**

This statute adopts the local law as the applicable rule in these cases.

In the North American case the property was situated in Alaska. There was no local law to be adopted, and the opinion of this Court distinguished that case from cases controlled by the local laws of the states on that ground **(253 U. S. 335).**

Fifth. If the rule announced by the Circuit Court of Appeals in this case prevails, then the amount which the landowner will receive for property taken for public use will be greater when the Government institutes the proceedings for condemnation than it will be if the landowner, after negotiating for some years, is compelled to institute and prosecute such proceedings through the

courts. In this case six years elapsed and the recovery of the landowners was increased 36 per cent because of the delay. If the landowner must suffer this much loss because the Government failed to institute proceedings for condemnation, then the remedy which is afforded to him by suit at law is not adequate. In justice, he ought to be permitted to maintain injunction against the Government to restrain it from taking possession until or unless condemnation proceedings are instituted by it, or payment is made at the time of the taking.

But this Court has ruled that he cannot maintain such injunction because his remedy at law will give the same compensation.

Hurley v. Kincaid, 285 U. S. 95.

In the instant case the lower court disposed of the above-cited holding of this Court with the statement: "The question of interest was not considered." We most respectfully insist that the question of interest was considered and ruled with petitioners' contention. The ground of the decision of this Court in the Hurley case was that the measure of compensation is the same, regardless of the procedure to ascertain it. In so holding this Court necessarily considered that interest will be added in the one proceeding as well as in the other when the rule of just compensation requires it.

For the reasons alleged in the petition we insist the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.